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Dellums v. Smith: Do the Neutrality Act and the Ethics in Government Act Unlock the Door to Nicaragua?

Introduction

The Reagan Administration's support of insurgent military activities in Nicaragua raises important questions of domestic law. Although United States district courts have ruled on the merits of some of these questions, federal courts of appeals have avoided the merits.¹ Appellate courts have dismissed the cases on grounds that the issues present non-justiciable political questions or that the plaintiffs lack standing to sue.² This Note criticizes the reasoning the courts of appeals have used in dismissing these cases, arguing that in at least one such case, *Dellums v. Smith*,³ courts should have resolved the legal issues raised by aspects of American involvement in Nicaragua.

This Note focuses upon the Ninth Circuit's interpretation of the Ethics in Government Act⁴ in *Dellums v. Smith*. In *Dellums*, three private citizens⁵ claimed they had suffered injuries from the Attorney General's

1. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) (plaintiffs who sought review of Attorney General's refusal to investigate possible executive criminal violations involving Nicaraguan military operations lacked standing); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (suit against President Reagan and other federal defendants for alleged violations of Neutrality Act, War Powers Resolution, and Alien Tort Statute dismissed for a variety of jurisdictional reasons); *Committee of United States Citizens Living in Nicaragua v. Reagan*, No. 86-2620 (D.D.C. Mar. 24, 1987) (WESTLAW, Allfeds library) (denying injunction that prohibited all aid to the *contras*); *Beacon Products Corp. v. Reagan*, 633 F. Supp. 1191 (D. Mass. 1986) (claim that the President exceeded his authority by imposing trade embargo on Nicaragua held to be a nonjusticiable political question). Cf. *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (suit by 29 Congresspersons challenging the legality of executive branch military assistance in El Salvador dismissed as presenting non-justiciable political questions).

2. See *infra* notes 32, 95-118 and accompanying text.

3. 797 F.2d 817 (standing denied to plaintiffs), *rev'g* *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983) (concluding that plaintiffs had standing to sue and ordering the Attorney General to conduct a preliminary investigation of alleged violations of the Neutrality Act by members of the Reagan Administration).

4. Ethics in Government Act of 1978, Pub. L. No. 521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591-598 (1982)) [hereinafter Ethics Act]. See *infra* notes 78-100 and accompanying text. The act was upheld by the U.S. Supreme Court in *Morrison v. Olson*, 56 U.S.L.W. 4835, 4838 (1988).

5. Plaintiff *Dellums* is a member of Congress on the House Armed Services Committee; Plaintiff *Cunningham* is a Nicaraguan resident who was allegedly raped
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refusal to conduct a preliminary investigation into whether the Reagan Administration's support of certain paramilitary operations against Nicaragua violated the Neutrality Act.⁶ The plaintiffs brought suit in federal district court on the ground that the Ethics in Government Act required the Attorney General to investigate plaintiffs' specific and credible claims of Neutrality Act violations.⁷ The district court granted plaintiffs the relief requested by ordering the Attorney General to investigate.⁸ The Court of Appeals for the Ninth Circuit, however, dismissed the case for lack of standing and because the decision of the Attorney General not to conduct an investigation under the Ethics in Government Act is not reviewable at the behest of private citizens.⁹

The Ninth Circuit's decision in *Dellums* had the immediate effect of preventing plaintiffs from receiving a judicial hearing on the merits of claims alleging that the Attorney General had disobeyed the Ethics Act. In the long run, *Dellums* will weaken the utility of the Neutrality and Ethics in Government Acts as tools for punishing and deterring executive branch wrongdoing abroad. The *Dellums* decision thus frustrates Congress's intent to compel investigation of crimes that deserve attention, but that the Attorney General, for political reasons, does not wish to prosecute.

Part I of this Note describes the background of the Nicaraguan litigations, describes the major statutes at issue in *Dellums*—the Neutrality Act,¹⁰ the Ethics in Government Act,¹¹ and the Administrative Procedure Act¹²—and sets forth the judicial interpretations of these statutes. Part I also explains the procedural history of *Dellums* and summarizes the Ninth Circuit's opinion. Part II analyzes the Ninth Circuit's decision, contending the court incorrectly dismissed the case. Part III relates the United States treatment to the approach taken by the World Court.

by U.S. supported *contras*; and Plaintiff Ginsberg resides in Dade County, Florida where Paramilitary forces are trained.

6. *Dellums*, 573 F. Supp. at 1491-92.

7. *Id.*

8. *Id.* at 1505.

9. *Id.* at 817. This Note will examine both the reviewability of the Attorney General's decision, and the justiciability of the plaintiffs' claims in *Dellums*. The reviewability analysis will consider whether the Administrative Procedure Act, the Ethics in Government Act and the Neutrality Act give the federal courts authority to review the Attorney General's decision not to conduct a preliminary investigation. See *infra* notes 40-164 and accompanying text. The justiciability analysis will inquire whether, assuming authority in the federal courts to entertain the *Dellums* claims, the courts should withhold review because of "the inappropriateness of the subject matter for judicial consideration." *Baker v. Carr*, 369 U.S. 186, 198 (1962). See *infra* notes 168-72 and accompanying text.

10. 18 U.S.C. § 960 (1982). See *infra* notes 43-52 and accompanying text.

11. 28 U.S.C. §§ 591-598 (1982).

12. 5 U.S.C. §§ 701-706 (1982). See *infra* notes 23-84 and accompanying text.

I. The Background of Litigation over American Activity in Nicaragua

The *Dellums* plaintiffs alleged that certain officials in the Reagan Administration had violated the Neutrality Act by planning to overthrow the government of Nicaragua, with whom the U.S. was at peace.¹³ The *Dellums* plaintiffs also alleged that the Attorney General had violated the Ethics Act by refusing to investigate Neutrality Act allegations.¹⁴ This Section summarizes the evidence of Executive support of a plan to overthrow the government of Nicaragua.

A. United States Involvement in Nicaragua

The United States has been and remains the primary sponsor of the "contras,"¹⁵ the paramilitary group fighting to "liberat[e] Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous Marxist state."¹⁶ The Reagan Administration has encouraged and supported *contra* activity, and has sometimes done so without congressional approval.¹⁷ The plaintiffs in *Dellums* advanced allegations, conceded by the Attorney General to be specific and credible,¹⁸ that the Reagan Administration had, in November, 1981, reviewed and approved a plan to overthrow the government of Nicaragua.¹⁹ The plaintiffs alleged, *inter alia*, that the plan "was being imple-

13. *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983).

14. *Id.*

15. In 1979, the Sandinista National Liberation Front [hereinafter the Sandinistas] ousted the Somoza family dictatorship that had controlled Nicaragua since the 1930's. Soon after the 1979 revolution, ex-Somoza National Guardsmen and other disenchanting exiles began to conduct military operations against the Sandinista government in hopes of gaining control of Nicaragua. Those rebels, known as the *contras*, have had both overt and covert support from the Reagan Administration. See, NICARAGUA: UNFINISHED REVOLUTION: THE NEW NICARAGUA READER, (P. Rosset ed. 1986) [hereinafter NICARAGUA READER].

16. The quotation comes from the subtitle of the Freedom Fighter's Manual, a publication attributed to the CIA. See *Nicaragua v. United States*, 1986 I.C.J. at 65-66.

17. President Reagan personally authorized the mining of Nicaraguan harbors in 1984. 130 CONG. REC. S4198 (daily ed. Apr. 10, 1984). The CIA launched 19 separate attacks from its "mother ships" against Nicaraguan ports and oil storage facilities. *CIA Internal Report Details U.S. Role in Contra Raids in Nicaragua Last Year*, Wall St. J., Mar. 6, 1985, at 20, col 1. See also Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1449 (1985); Butler, *U.S.-Nicaraguan Relations Since 1979*, in NICARAGUA READER, 209.

The question whether Congress should declare war on Nicaragua because of a genuine communist threat to Central America is beyond the scope of this Note. For an argument favoring American support for the *contras*, see Muravchik, *The Nicaragua Debate*, 65 FOREIGN AFF. 366 (1986). For an argument against supporting the *contras*, see Bundy, *Beware of Aiding the Contras*, NICARAGUA READER 270. See also 130 CONG. REC. S4197-S4205 (daily ed. Apr. 10, 1984) (Senators expressing disapproval of the Reagan Administration's covert activities in Nicaragua). One of the district court's greatest fears in *Dellums* was "the danger that, unless the violations [of the Neutrality Act are] terminated, the nation may be involved in a war not declared by Congress." *Dellums*, 577 F. Supp. at 1456.

18. *Dellums*, 797 F.2d at 821; *Dellums v. Smith*, 577 F. Supp. at 1450.

19. The Reagan Administration has, however, insisted that its goal has not been to overthrow the present government of Nicaragua. In a report to Congress on April

mented and includes:"

- (1) providing at least \$19 million to finance covert paramilitary operations against the people and property of Nicaragua;
- (2) financing the training of invasionary forces in the United States and Honduras, including former Somoza National Guardsmen, various terrorist groups and others;
- (3) conducting intelligence activities by the CIA to determine the specific targets for such anti-Nicaraguan terrorist forces;
- (4) using Honduras as a base for invasionary forces;
- (5) supporting organizations of Nicaraguan and Cuban exiles based in the United States which, in turn, train and support invasionary forces on United States soil; and
- (6) sending hundreds of CIA officers and agents and other U.S. government agents to Honduras and Costa Rica to participate and assist in covert military operations against the people and government of Nicaragua.²⁰

Indeed, the International Court of Justice found that the United States had violated international law by encouraging several specific attacks on Nicaraguan territory and mining the territorial waters of Nicaragua.²¹ Even after the Boland Amendment²² prohibited all direct military assistance to the *contras*, the Administration supported attacks against the government of Nicaragua by ex-CIA men.²³

B. Avoiding the Merits of Cases Concerning Nicaragua: The Political Questions Doctrine

The *Dellums* plaintiffs had also sued the Reagan Administration in *Sanchez-Espinoza v. Reagan*,²⁴ another major judicial challenge to American actions in Nicaragua. In *Sanchez*, members of the United States House of Representatives, residents of Nicaragua, and residents of Florida joined to bring several claims. The members of Congress, claiming that the Reagan Administration's actions in Nicaragua deprived them of their constitutional right to declare war,²⁵ sought declaratory and injunctive relief. They also claimed that the President had violated several statutes, including the Neutrality Act²⁶ and the War Powers Resolution.²⁷ The other plaintiffs alleged causes of action under the Alien

10, 1985, the President stated, "United States policy toward Nicaragua since the Sandinistas' ascent to power has consistently sought to achieve changes in Nicaraguan government policy and behavior. We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government." *Nicaragua v. U.S.*, 1986 I.C.J. at 56.

20. *Dellums*, 573 F. Supp. at 1492.

21. *Nicaragua v. U.S.*, 1986 I.C.J. at 146-47.

22. Continuing Appropriations Act of 1982, Pub. L. No. 97377, § 793.

23. Parry & Barger, *How the White House Ran the Secret 'Contra' War: Reagan's Shadow CIA*, THE NEW REPUBLIC, Nov. 24, 1986, at 23. See also CHARDY, *U.S. Found to Skirt Ban on Aid to Contras*, in NICARAGUA READER, *supra* note 15, at 258.

24. 568 F. Supp. 596, 598 (D.D.C. 1983), *aff'd* 770 F.2d 202 (D.C. Cir. 1985).

25. U.S. CONST. art. I, § 8, cl. 11.

26. 18 U.S.C. §§ 956-960 (1982).

27. 50 U.S.C. §§ 1541-1548 (1982).

Tort Statute²⁸ and Florida nuisance law.²⁹ The district court found that the plaintiffs' claims posed nonjusticiable political questions.³⁰

Courts invoke the political question doctrine to avoid considering the merits of a dispute they find beyond their competence or power to decide.³¹ The doctrine specifies a variety of factors, outlined in *Baker v. Carr*,³² that may warrant dismissal as a political question. The district court in *Sanchez-Espinoza*, picking from the *Baker v. Carr* list of factors, dismissed the congressional and Nicaraguan plaintiffs' claims because: (1) the "Court lacks judicially discoverable and manageable standards for resolving the dispute;" (2) it would be impossible to resolve the matter "without expressing a lack of respect due coordinate branches of government;" and (3) there would be "danger of embarrassment from multifarious pronouncements by various departments."³³

The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision.³⁴ However, Judge Scalia, writing for the court, said "without necessarily disapproving the District Court's conclusion that all aspects of the present case present a nonjusticiable political question, we choose not to resort to that doctrine for most of the claims."³⁵ The court decided the other claims on grounds which the district court did not address, an unusual occurrence that may indicate discomfort with the lower court's application of the political question doctrine.³⁶

28. 28 U.S.C. § 1350 (1982).

29. *Sanchez-Espinoza*, 568 F. Supp. 598 (paramilitary training camps alleged to constitute a nuisance under Florida law).

30. *Id.* at 600-01.

31. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). Courts have occasionally appeared to use the political question doctrine to avoid reviewing the merits of unpopular disputes. Griffin, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U. L. REV. 163 (1983). See also *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (suit by 29 Congresspersons challenging the legality of executive branch military assistance in El Salvador dismissed without resolution of merits); Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985).

32. The Supreme Court's frequently quoted description of the political question doctrine follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjusticiable discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 368 U.S. at 217.

33. *Sanchez-Espinoza*, 568 F. Supp. at 600. The *Sanchez* Court relied on *Crockett*, 720 F.2d 1355.

34. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

35. *Sanchez-Espinoza*, 770 F.2d at 206.

36. The court of appeals resorted to the political question doctrine only to affirm the dismissal of the congressional plaintiffs' claim that they had been deprived of their right to declare war. *Sanchez-Espinoza*, 568 F. Supp. at 600. The court resolved

In *Beacon Products Corp. v. Reagan*,³⁷ the second major challenge to the Reagan Administration's actions towards Nicaragua, the court also held that the issues posed non-justiciable political questions.³⁸ In *Beacon Products*, various American exporters sued the President for imposing a trade embargo and for terminating a friendship treaty with Nicaragua without Congressional approval. The Court invoked the *Baker v. Carr* factors to conclude that the issues were inappropriate for judicial resolution.³⁹

C. *Dellums v. Smith*: Avoiding the Merits on Unreviewability Grounds

In *Dellums*, the court also failed to reach the merits. However, *Dellums* represents another way in which the judiciary has avoided reaching the merits in cases concerning American policy in Nicaragua. Instead of basing dismissal on the political questions doctrine, the *Dellums* court dismissed the case on reviewability grounds.

1. *The Statutes in Dellums v. Smith*

The *Dellums* plaintiffs, frustrated by the dismissal in *Sanchez-Espinoza*, shifted tactics in their challenge to the Reagan Administration's violations of the Neutrality Act. Instead of directly challenging Neutrality Act violations, the plaintiffs used the Ethics in Government Act, which provides that the Attorney General "shall" investigate crimes allegedly committed by executive branch officials.⁴⁰ The Administrative Procedure Act⁴¹ governs the applicability of the Ethics Act.⁴² The following

the claim under the Neutrality Act, 18 U.S.C. § 960 (1982), a section of the United States Criminal Code, by holding that private parties could not enforce Congress's prerogative to declare war "since this would have the practical effect of eliminating prosecutorial discretion in an area where the normal desirability of such discretion is vastly augmented by the broad leeway traditionally accorded the Executive in matters of foreign affairs." *Sanchez-Espinoza*, 770 F.2d at 210. The court decided that the statutes on which the plaintiffs had based the remainder of their claims could not support the remedies plaintiffs had requested. The court of appeals rejected claims based upon the War Powers Resolution, 58 U.S.C. §§ 1541-1548 (1982), because the Resolution provided no remedy for private parties in the case, believing that creation of such a remedy would have been beyond its power. *Sanchez-Espinoza*, 770 F.2d at 209. The court also held it could not grant relief under the Alien Tort Statute, 28 U.S.C. § 1350 (1982), without abusing its "discretion to provide discretionary relief." *Sanchez-Espinoza*, 770 F.2d at 202.

37. 633 F. Supp. 1191 (D. Mass. 1986) (claim that the President exceeded his authority by imposing trade embargo on Nicaragua held to be a non-justiciable political question).

38. *Id.*

39. *Id.* at 1194.

40. 28 U.S.C. § 591 (1982).

41. 5 U.S.C. § 701-06 (1982).

42. *Dellums v. Smith*, 573 F. Supp. 1489, 1498-99 (N.D. Cal. 1983), *motion to alter judgment denied*, 577 F. Supp. 1449 (N.D. Cal. 1984). The U.S. Court of Appeals for the Ninth Circuit, reversing, denied the *Dellums* plaintiffs standing to sue. The court's reading of the Ethics Act in light of the Administrative Procedure Act guidelines persuaded it "that Congress did not intend to create procedural rights in private citizens sufficient to support standing to sue." *Dellums*, 797 F.2d at 823.

Sections examine the operation, relationship and interpretation of these three pivotal statutes.

a. The Neutrality Act

The Neutrality Act's fundamental purpose is to preserve Congress's exclusive power to declare war.⁴³ The Neutrality Act provides that:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.⁴⁴

Although strictly enforced throughout the nineteenth and early twentieth centuries, the Neutrality Act is now less important,⁴⁵ and even openly disobeyed.⁴⁶ However, despite selective enforcement, the Neutrality Act still has teeth; since 1982 it has been the basis for convicting two separate groups of mercenaries.⁴⁷

The Neutrality Act, though inspired by an English statute exempting acts committed by the head of state, conspicuously excluded any exception for acts by the executive.⁴⁸ The American version of the Neutrality Act begins with the unqualified word "whoever,"⁴⁹ and as early as 1807 courts interpreted the Act to apply to Presidentially-authorized activity.⁵⁰ Early presidents formally recognized this interpretation.⁵¹

43. Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1, 27-37 (1983). Congress's war power is set out in U.S. CONST. art. I, § 8, cl. 11.

44. The paragraph quoted is the entire text of the Neutrality Act, 18 U.S.C. § 960 (1982).

45. Lobel, *supra* note 43, at 27-37.

46. *Id.* at 2-4; see also Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV L. REV. 1955 (1982).

47. *United States v. Ramirez*, 765 F.2d 438 (5th Cir. 1985) (defendants convicted of violating Neutrality Act for planning to overthrow the government of Haiti); *United States v. Black* 685 F.2d 132 (5th Cir. 1982) (defendants convicted of violating Neutrality Act for planning to overthrow the government of the Republic of Dominica).

48. Lobel, *supra* note 43, at 31-33.

49. See text accompanying *supra* note 44.

50. "This instrument [the Constitution], which measures out the powers and defines the duties of the President, does not vest in him any authority to set on foot a military expedition against a nation with which the United States is at peace." *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.N.Y. 1807), quoted in *Dellums*, 577 F. Supp. at 1452. Thus, the judicial and legislative histories of the Act indicate that Congress passed the Act to prevent all parties subject to United States law, including the President, from usurping Congress's exclusive constitutional power to declare war.

51. "[W]hether the interest or honor of the United States requiring that they should be made a party to any such struggle, and by inevitable consequence to the war which is waged in its support, is a question which by our Constitution is wisely left to Congress alone to decide." President Martin Van Buren, Second Annual Message to Congress (Dec. 3, 1938), quoted in *Dellums*, 577 F. Supp. at 1453.

Indeed, two attempts failed during the 1850s to amend the Act to exempt Presidentially-authorized activity.⁵²

b. The Ethics in Government Act

The *Dellums* plaintiffs hoped to revive the Neutrality Act's power over the Executive by using the Ethics in Government Act of 1978⁵³ to compel the Attorney General to investigate possible Neutrality Act violations. The Ethics Act requires the Attorney General to hand over to a disinterested independent counsel the criminal investigation and prosecution of certain officials in the Executive branch.⁵⁴ The Act arose out of Congress's concern that the Attorney General might have a conflict of interest in prosecuting the President who appointed him.⁵⁵ Congress wanted to ensure that federal executive criminals would not escape punishment under the cover of the Attorney General's wide prosecutorial discretion.⁵⁶ Despite "adamant opposition of the Reagan Administration,"⁵⁷ Congress continues to support the Ethics Act.⁵⁸

52. *Dellums*, 577 F. Supp. at 1453.

53. 28 U.S.C. §§ 591-598 (1982).

54. The legislative history of the Ethics Act states:

The basic purpose of the [Ethics Act] . . . is to promote public confidence in the impartial investigation of alleged wrongdoings by government officials. Prompted by the events of Watergate, Congress recognized that actual or perceived conflicts of interest may exist when the Attorney General is called on to investigate alleged criminal activities by high-level government officials.

S. REP. NO. 496, 97th Cong., 2d Sess. 4, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3540. *See also* S. REP. NO. 170, 95th Cong., 1st Sess. 5-6, *reprinted in* 1978 U.S. CODE CONG. ADMIN. NEWS 4216, 4218-22 (listing various reasons for reorganizing the Department of Justice). The District Court in *Dellums* concluded that the legislative history of the Ethics Act revealed four basic purposes:

One such purpose is to deny the Attorney General the power to refuse to make at least a preliminary investigation upon receipt of reasonably specific information from credible sources of violation of federal criminal law by members of the same branch of the government he serves. Another of the statute's purposes is to provide, in proper cases, for prosecution by independent counsel free from conflict of interest by virtue of ties to the executive. Yet another purpose is to ensure that no one, however high or important a position he holds in the executive branch, is insulated from the investigation called for by the provisions of the Ethics in Government Act. Finally, the underlying purpose—perhaps the most salient of all—is to help ensure that neither Congress nor the public shall be denied the facts when substantial claims of violation of federal law implicate high federal officials.

Dellums, 573 F. Supp. at 1493.

55. S. REP. NO. 170, 95th Cong., 1st Sess. 5-6, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4216, 4217-21. *See also supra* note 54. The independent counsel is also known as a "special prosecutor."

56. *Supra* note 55.

57. S. REP. NO. 496, 97th Cong., 2d Sess. 4, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3561. The Justice Department has advocated the repeal of the Ethics Act, stating that the Act derogates the position of Attorney General and violates the Constitution. In correspondence, Attorney General Smith stated, "After a careful review of the Act within the Department of Justice and an analysis of its practical effect over the past few years, I have serious reservations concerning the constitutionality of the Act. In some or all of its applications, the Act appears fundamentally to contradict the principle of separation of powers erected by the

The Ethics Act divides the Attorney General's duties to investigate executive activity into two stages.⁵⁹ The first stage involves the "preliminary investigation" of possible criminal activity;⁶⁰ the second stage involves the Attorney General's determination whether to request the appointment of independent counsel.⁶¹

i. The First Stage: Preliminary Investigation

The Attorney General "shall" conduct a "preliminary investigation" which is "not to exceed ninety days" whenever he receives specific and credible information⁶² that a "listed" official may have committed a non-petty offense.⁶³ In contrast, the Attorney General retains discretion regarding unlisted officials; in this context, the Act states that he "may" conduct an investigation.⁶⁴ In *Dellums*, the officials concerned are "listed,"⁶⁵ and the Attorney General therefore must conduct a preliminary investigation upon receiving specific and credible information.⁶⁶

ii. The Second Stage: Discretionary Decision

After the Attorney General has completed his preliminary investigation, he then must decide whether to ask a special division of the court to

Constitution." SPECIAL PROSECUTOR PROVISIONS OF ETHICS IN GOVERNMENT ACT OF 1978: A REPORT PREPARED BY THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS, 97th Cong., 1st Sess. 6 (1981).

58. "Based on its investigation and hearings, the Committee has concluded that the special prosecutor provisions must be retained in order to guard against actual and perceived conflicts of interest in the investigation of high-ranking Executive Branch officials. . . ." *Id.* at 3540.

59. "[T]he preliminary investigation and the decision to prosecute are two distinct steps in the statutory process. The Ethics Act does not disturb the government's discretion in the latter instance." *Banzhaf v. Smith*, 588 F. Supp. 1489, 1497 n.42 (D.D.C.), *vacated*, *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (citizens challenged Attorney General's failure to prosecute Reagan aides for alleged theft of documents during 1980 presidential campaign).

60. 28 U.S.C. §§ 592(a) (1982).

61. 28 U.S.C. §§ 592(b)-(c) (1982).

62. 28 U.S.C. §§ 591, 592(a) (1982). "The legislative history . . . made clear that the announced criteria of specificity and credibility are the only ones to be applied in determining whether a preliminary investigation is required." *Dellums v. Smith*, 573 F. Supp. 1489, 1498 (N.D. Cal. 1983). The specific and credible evidence standard was meant to be an extremely low standard for plaintiffs to meet. S. REP. NO. 496, 97th Cong., 2d Sess. 11-12, 21, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3547-48, 3557.

63. 28 U.S.C. § 591(a) (1982). The following section of the Ethics Act similarly begins, "[u]pon receiving information . . . the Attorney General *shall* conduct . . . [a] preliminary investigation. . . ." 28 U.S.C. § 592(a)(1) (1982).

64. 28 U.S.C. § 591(c) (1982).

65. The Ethics Act lists approximately 70 positions, including the President and his Cabinet. 28 U.S.C. § 591(b) (1982); S. REP. NO. 496, 97th Cong., 2d Sess. 7, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3537, 3543.

66. The Department of Justice conceded that the Attorney General had a duty to investigate. "There is no question, as the district court stresses . . . , that the Ethics Act imposes mandatory obligations on the Attorney General. . . ." Brief for Appellants at 16, *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986).

appoint an independent counsel to prosecute the case.⁶⁷ If the Attorney General decides not to ask for the appointment of an independent counsel, he must then file with the special division a memorandum summarizing the information received and the results of his investigation.⁶⁸ The Act states clearly that the Attorney General's decision to request the appointment of independent counsel is unreviewable "*in any court*."⁶⁹ In contrast, if the Attorney General decides *not to request* an independent counsel, the Act states only that the *special division* may not review this decision.⁷⁰

iii. Policing the Attorney General

The Ethics Act contains only one explicit policing mechanism.⁷¹ This mechanism allows a majority of the members of either party on the Judiciary Committee of either house of Congress to "request in writing that the Attorney General apply for the appointment of a [sic] independent counsel."⁷² The Act does not state, however, that this oversight provision is the exclusive remedy for Attorney General inaction.

67. 28 U.S.C. § 592(b)-(c) (1982). The special division of the court is established under 28 U.S.C. § 49 (1982) to handle uncommon cases such as those that are prosecuted under the Ethics Act. The duties of the special court, including appointing an appropriate independent counsel to handle the prosecution, are outlined in 28 U.S.C. § 593 (1982).

68. 28 U.S.C. § 592(b) (1982). If the Attorney General decides the case merits prosecution, he must then turn it over to the special division, which will appoint an independent counsel. U.S.C. § 592(c) (1982). The Attorney General never filed a memorandum in *Dellums* because he had not conducted a preliminary investigation on which to base a memorandum.

69. "The Attorney General's determination . . . to apply to the division of the court for the appointment of a [sic] independent counsel shall not be reviewable in any court." U.S.C. § 592(f) (1982).

70. 28 U.S.C. § 592(b)(1) (1982). The Ethics Act does not state whether other courts may review the Attorney General's decision *not to* ask for an independent counsel. See Comment, Banzhaf v. Smith: Judicial Review Under the Independent Counsel Provisions of the Ethics in Government Act, 70 IOWA L. REV. 1339, 1346 (1985). This situation creates the possibility for an interesting application of Heckler v. Chaney's holding that agency non-action, as opposed to action, creates a rebuttable presumption of unreviewability. Section 592(f) of the Ethics Act creates a statutory scheme where "non-action" may have less statutory discretion than action. For a discussion of Heckler, see *infra* note 83. The language of section 592(b)(1) is as follows: "If the Attorney General, upon completion of the preliminary investigation, finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified . . . and the division of the court shall have no power to appoint a [sic] independent counsel" (emphasis added). 28 U.S.C. § 592(b)(1) (1982). In *Dellums*, even § 592(b)(1) of the Ethics Act did not apply because the Attorney General had not yet completed a preliminary investigation.

71. 28 U.S.C. § 595(e) (1982).

72. "A majority of majority party members or a majority of non-majority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of a [sic] independent counsel." 28 U.S.C. § 595(e) (1982).

c. The Administrative Procedure Act

Ideally, a private party activates the provisions of the Ethics in Government Act by supplying the Attorney General with specific and credible evidence of illegal activity. If the Attorney General fails to act, however, the private party may turn to the courts for assistance. The Administrative Procedure Act ("APA")⁷³ provides the framework for determining when a court may comply with the requests of private parties for review of an agency decision. For purposes of APA reviewability, courts have held that the Attorney General is an "agency."⁷⁴

The APA's "Right of Review" provision creates a presumption that agency action is reviewable.⁷⁵ In *Abbott Laboratories v. Gardner*,⁷⁶ a landmark case addressing the judicial reviewability of agency action, drug manufacturers challenged a regulation promulgated by the Food and Drug Administration. In allowing judicial review, the Court focused on the APA, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action. . . ."⁷⁷

Though the language of the APA's "Right of Review" provision seems clear, beginning "[a] person . . . adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof," section 701 of the APA places two limitations on this seemingly clear presumption of reviewability. First, under section 701(a)(i), the right of review provisions apply except when "statutes preclude review." A party can rebut the presumption of reviewability by showing that Congress intended to preclude review in a particular statute. This demonstration of intent, however, must be clear and convincing. Thus, in *Abbott Laboratories*, the

73. 5 U.S.C. §§ 701-706 (1982). See generally 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 23 (2d ed. 1983); 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 28 (2d ed. 1984). Although the Administrative Procedure Act does not by itself grant federal courts subject matter jurisdiction over cases involving federal jurisdiction agendas, the Act buttresses the federal question jurisdiction that exists under 28 U.S.C. § 1331 (1982). 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 23:3, :19 (2d ed. 1983).

74. See *Banzhaf v. Smith*, 737 F.2d 1167, 1168 (D.C. Cir. 1984), citing *Morris v. Gressette*, 432 U.S. 491, 500-01 (1977) and *Proietti v. Levi*, 530 F.2d 836, 838 (9th Cir. 1976).

75. 5 U.S.C. § 702 (1982).

76. 387 U.S. 136 (1967).

77. The Supreme Court remarked that the cases supporting judicial review of agency action

have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed to law by agency discretion, 5 U.S.C. § 701 (a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704.

Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) (reviewing decisions of the Commissioner of Food and Drugs under the Food, Drug, and Cosmetic Act).

Court noted that "the Administrative Procedure Act's 'generous review provision' must be given a 'hospitable' interpretation . . . [and] that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."⁷⁸

Second, even if section 701(a)(1) does not apply, the government can still defeat the presumption of reviewability by showing that "agency action is committed to agency discretion."⁷⁹ *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁸⁰ the leading case on this exception to reviewability, stands for the proposition that judicial review is available where there is "law to apply."⁸¹ Referring to the section 701(a)(2) exception, the court remarked that "the legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"⁸²

Although *Overton Park* reinforced the general presumption of reviewability, *Heckler v. Chaney*⁸³ reverses the presumption, creating a presumption of unreviewability in cases of agency nonenforcement. However, this "presumption [of unreviewability] may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."⁸⁴

2. *The Decisions in Dellums v. Smith*

a. The District Court Decision

In both *Dellums* and *Sanchez-Espinoza*, the plaintiffs argued that Reagan Administration officials had violated the Neutrality Act.⁸⁵ However, though the *Sanchez-Espinoza* plaintiffs relied on the Neutrality Act itself,⁸⁶ the *Dellums* plaintiffs invoked the first stage requirement that the Attorney General conduct a preliminary investigation when presented with

78. 387 U.S. at 140-41.

79. 5 U.S.C. at § 701(a)(2) (1982).

80. 401 U.S. at 402 (1971).

81. 401 U.S. at 413.

82. 401 U.S. at 410.

83. 470 U.S. 821 (1985) (The FDA's decision not to take enforcement actions not subject to judicial review).

84. 470 U.S. at 833. The *Heckler* Court adds that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* *Heckler* is not controlling in *Dellums* because the *Dellums* plaintiffs' suit clearly fulfills these interpretive guidelines. The Ethics Act has presented the Attorney General with the guidelines "specific and credible evidence," which trigger his duty to conduct a preliminary investigation. Congress has, in addition, therefore circumscribed the Attorney General's traditional prosecutorial discretion, its "power to discriminate among issues or cases it will pursue." *Id.*

85. The *Dellums* plaintiffs also presented evidence suggesting possible violations of 18 U.S.C. § 956, concerning conspiracy to injure property of a foreign government, and of 18 U.S.C. § 922, dealing with illegal arms shipment. *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983).

86. 770 F.2d 202, 209 (1985).

specific and credible evidence.⁸⁷

The district court noted that, "[t]he Attorney General now agrees that the information presented was sufficiently specific and came from a sufficiently credible source (citation omitted). Indeed evaluation of that information reveals a formidable array of specific allegations."⁸⁸ The court determined that the Ethics Act granted members of the public standing to sue because, "[i]f Congress . . . created a legal right to a preliminary investigation for persons supplying the required information, then the requisite interest for standing is found in the invasion of that right."⁸⁹ The court also found that, if it could not compel the Attorney General to investigate, the Ethics in Government Act would be rendered meaningless.⁹⁰ The court accordingly ordered the Attorney General to conduct a preliminary investigation.⁹¹

87. *Dellums*, 573 F. Supp. at 1491-92. The plaintiffs had sent their evidence of the Administration's November, 1981, plan to overthrow the Nicaraguan government directly to the Attorney General in January 1983. *Id.*

88. *Dellums*, 577 F. Supp. at 1450 n.1 (1984). "The Attorney General refused to conduct any investigation, stating that the material provided 'does not constitute specific information of a federal offense "sufficient to constitute grounds to investigate."'
Dellums, 573 F. Supp. at 1492.

89. *Dellums*, 573 F. Supp. at 1495. The key issue on appeal was whether the plaintiffs had standing. The Ninth Circuit held that they did not. *Dellums*, 797 F.2d 817, 823 (9th Cir. 1986).

90. In concluding that the Ethics Act did not expressly or impliedly preclude a private right of action, *Dellums*, 573 F. Supp. at 1498, the court in fact saw a strong need for the plaintiffs to have standing:

In order to preserve confidence in governmental accountability, Congress, by enacting the Ethics in Government Act, and the President, by signing it, removed certain actions and determinations from the oft-hidden realm of the "political process" and required the creation of a record subject to public and congressional scrutiny.

This Court will not declare that effort a nullity and accordingly concludes that the plaintiffs have alleged sufficient injury to maintain this action.

Id. at 1497.

The court used the law of standing to determine that the *Dellums* plaintiffs could properly bring the Attorney General to court. The plaintiffs had met the requirements for standing by showing (1) they had personally "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) the injury "fairly can be traced to the challenged action," and (3) that the injury "is likely to be redressed by a favorable decision." *Id.* at 1494. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (plaintiff showed injury in fact sufficient to establish standing). The court also held that the plaintiffs' interest fell within the "zone of interests" protected by the Ethics Act, and recognized the plaintiffs' standing based on this protected interest. *Dellums*, 573 F. Supp. at 1497 n.7. See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970) (plaintiffs had standing to challenge a decision of the Comptroller of Currency). The district court also argued that "There can be no doubt that plaintiffs have been injured by the refusal of the Attorney General to conduct a preliminary investigation." *Dellums*, 573 F. Supp. at 1494. Later in its analysis, the court continued, "Since the Attorney General's decision not to conduct a preliminary investigation injured plaintiffs legal interests, the Attorney General's decision is subject to judicial review." *Id.* at 1498.

91. "IT IS HEREBY FURTHER ORDERED that The Attorney General shall conduct a Preliminary investigation pursuant to 28 U.S.C § 592 into the conduct of any person presently covered by Ethics in Government Act named in the information

b. The Ninth Circuit Decision

The district court in *Dellums* denied the Attorney General's request for a stay pending appeal.⁹² The Court of Appeals for the Ninth Circuit granted the stay and promised an expedited appeal.⁹³ Two years later, the court reversed the district court, holding that the decision of the Attorney General not to conduct an investigation under the Ethics in Government Act is not reviewable at the behest of private citizens and that the plaintiffs necessarily lack standing to sue.⁹⁴

The court primarily relied on *Block v. Community Nutrition Institute*⁹⁵ and *Banzhaf v. Smith*⁹⁶ to bolster its argument against reviewability. Citing these two cases, the court found that the statutory scheme of the Ethics Act manifested "an intent to preclude review at the behest of members of the public suing in their private capacities."⁹⁷ The court reasoned that the public generally lacks standing to sue simply because the government is violating the law.⁹⁸ Congress may create a procedural right establishing standing, but the court must find some "evidence in the statutory language, purpose or legislative history that Congress intended to create such rights."⁹⁹ The court found the Ethics Act "barren of such evidence."¹⁰⁰

3. Case Law Interpreting the Statutory Framework of the Ethics Act and the Administrative Procedure Act

Only *Dellums* and two other cases have addressed whether private parties may invoke the Ethics Act by a suit compelling the Attorney General to act upon information supplied to him.¹⁰¹ In each case, the circuit court reversed the district court's order that the Attorney General undertake a preliminary investigation.

a. *Nathan v. Attorney General*: Stage One of the Ethics Act

In *Nathan v. Attorney General*,¹⁰² the plaintiffs sought to compel the Attor-

submitted by plaintiffs relating to violations of the Neutrality Act, 18 U.S.C. § 960, arising out of actions connected to paramilitary expeditions against Nicaragua. . . ." *Dellums*, 573 F. Supp. at 1505. The court ordered the Attorney General to investigate within 90 days and denied the Attorney General's motion for a stay pending appeal. *Dellums*, 577 F. Supp. at 1459.

92. 573 F. Supp. 1489 (N.D. Cal. 1983).

93. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986).

94. *Id.*

95. 467 U.S. 340 (1984) (holding the consumers may not obtain judicial review of milk market prices set by the Secretary of Agriculture).

96. 737 F.2d 1167 (D.C. Cir. 1984) (holding that Congress intended the Ethics in Government Act to preclude judicial review).

97. *Dellums*, 797 F.2d at 823.

98. *Id.* at 821.

99. *Id.*

100. *Id.*

101. *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984).

102. 557 F. Supp. 1186, 1187 (D.D.C. 1983), *rev'd sub nom.* *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984).

ney General to investigate officials who allegedly failed to prosecute an attack by members of the Ku Klux Klan and the American Nazi Party on black and Communist demonstrators. The United States District Court for the District of Columbia ordered the Attorney General to conduct a preliminary investigation.¹⁰³ The court of appeals reversed in a one sentence decision, followed by two concurring opinions.¹⁰⁴ Judge Bork's concurrence asserted that the plaintiffs lacked standing and could not imply a private cause of action under the Ethics Act.¹⁰⁵ Judge Davis's concurrence assumed that the court had jurisdiction, but dismissed the case because the plaintiffs did not provide "specific information" for the Attorney General to review.¹⁰⁶

b. *Banzhaf v. Smith*:¹⁰⁷ Stage Two of the Ethics Act

The plaintiffs in *Banzhaf v. Smith* gave the Attorney General specific information about wrongdoing committed by federal officers during the 1980 presidential campaign.¹⁰⁸ The plaintiffs also formally requested that the Attorney General ask for the appointment of an independent counsel.¹⁰⁹ The district court ordered the Attorney General to request the independent counsel's appointment.¹¹⁰ On appeal, the D.C. Circuit held that the Ethics in Government Act precluded judicial review of the Attorney General's decision.¹¹¹

The Court of Appeals decision relied heavily upon the Administrative Procedure Act (APA) as applied in *Block v. Community Nutrition Institute*.¹¹² *Block* held that "congressional intent to preclude judicial review [that is] 'fairly discernible in the statutory scheme' " may override the APA's presumption of the reviewability of agency action.¹¹³ The *Banzhaf* Court relied on a formulation in *Block* that "'specific legislative history' " or "'inferences of intent drawn from the statutory scheme as a whole' " ¹¹⁴ required a finding that the Ethics Act evidences a congres-

103. *Nathan*, 563 F. Supp. at 817 (D.D.C. 1983).

104. *Nathan*, 737 F.2d at 1070.

105. *Id.* at 1077. Judge Bork thought allowing the judicial branch to give orders to the Attorney General, a member of the executive branch, raised a separation of powers problem. Judge Bork also believed that ordering the Attorney General to apply for the appointment of an independent counsel would unduly interfere with the executive branch's prosecutorial discretion. *Id.* at 1079.

106. *Id.* at 1072.

107. 737 F.2d 1167 (D.C. Cir. 1984).

108. The complaint alleged, *inter alia*, that four of President Reagan's aides had admitted possessing or seeing documents taken from the Carter White House under suspicious circumstances during the 1980 presidential campaign. *Banzhaf v. Smith*, 588 F. Supp. 1489, 1491 (D.D.C. 1984).

109. *Banzhaf*, 588 F. Supp. at 1490.

110. *Id.* at 1168.

111. *Banzhaf*, 737 F.2d at 1167-68.

112. 467 U.S. 340 (1984).

113. *Id.* at 351. The court in *Block* acknowledged "the presumption favoring judicial review of administrative action," but stated that the presumption "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 349.

114. *Banzhaf*, 737 F.2d at 1169 (quoting *Block*, 467 U.S. 353, 104 S. Ct. at 2456).

sional intent to deny private citizens a right of action against the Attorney General. The court construed the Ethics Act provision prohibiting special division review of the Attorney General's decision *not to ask for* appointment of independent counsel¹¹⁵ so as to preclude other courts from reviewing the Attorney General's decision.¹¹⁶ The Court also found that Congress considered and rejected proposals that would have provided a private right of review,¹¹⁷ showing that Congress intended the section 595(e) oversight provision to be the exclusive remedy for violations of the Ethics in Government Act.¹¹⁸

II. Analysis of *Dellums v. Smith*

Dellums v. Smith presents a clear case for judicial review of aspects of American involvement in Nicaragua. In November, 1981, administration officials violated the Neutrality Act by planning a military effort to overthrow the government of a country against which the United States had not declared war.¹¹⁹ Although the Justice Department has not enforced the Neutrality Act rigorously in recent years,¹²⁰ that law traditionally has governed all citizens, including the President and members of his Cabinet.¹²¹ This Neutrality Act violation therefore comes within the scope of the Ethics Act's standards governing prosecutorial discretion in situations where the Attorney General might have a conflict of interest.

Under the Ethics Act, the Attorney General was required to investigate the crimes alleged by the *Dellums* plaintiffs.¹²² Indeed, no one has denied that the Attorney General violated the Act by refusing to investigate.¹²³ The real issue involved a determination of who could compel the Attorney General to obey the law. The Ninth Circuit held that no one, with the possible exception of certain members of the judiciary committees, could enforce the Ethics in Government Act.¹²⁴

115. See *supra* notes 67-72 and accompanying text for a discussion of this prohibition.

116. *Banzhaf*, 737 F.2d at 1169.

117. *Id.* at 1170.

118. *Id.* at 1169.

119. See *supra* notes 17-24 and accompanying text.

120. See *supra* notes 69-71 and accompanying text.

121. See *supra* notes 68-77 and accompanying text.

122. "Even if no one had standing, the Attorney General would still have his own, independent obligation under the [Ethics] Act. Upon coming into possession, *from any source*, of information concerning law violations by high-level officials, he has the responsibility under the statute to conduct a preliminary investigation and to submit results to the special judicial division." *Banzhaf v. Smith*, 588 F. Supp. 1489, 1498 n.46 (D.D.C. 1984). Cf. *Nathan v. Smith*, 737 F.2d 1069, 1081 (D.C. Cir. 1984) (Bork, J., concurring).

123. The Attorney General conceded that he had received evidence sufficient to trigger his duty under the Ethics Act to investigate. See *supra* note 135.

124. *Dellums*, 797 F.2d at 823 ("Central to our analysis is the Ethics Act's provision for oversight of the Attorney General's compliance with the Ethics Act by members of the congressional judiciary committees, not the public. See 28 U.S.C. § 595. Our

The Ninth Circuit, however, should have affirmed the district court opinion and ordered the Attorney General to investigate the allegations for three reasons. First, any member of the public may seek judicial review of the Attorney General's decision not to investigate under stage one of the Ethics in Government Act. Second, the *Dellums* plaintiffs had standing to sue. Third, the court should not invoke the political question doctrine to avoid a judgment on the merits in cases like *Dellums*.

A. Can a Member of the Public Seek Judicial Review Under Stage One of the Ethics Act?

The APA establishes a presumption that plaintiffs have standing to challenge agency action under a statute unless 1) the statute evidences congressional intent to preclude review or 2) agency action is committed to agency discretion. The presumption of reviewability remains intact because neither of these two exceptions applies.¹²⁵

1. *The APA Section 701(a)(1) Exception: Intent to Preclude Review*

a. The Language of the Ethics Act Does Not Support This Exception

This exception does not apply, thereby leaving the presumption of reviewability intact, because Congress did not evince clear and convincing evidence of intent to preclude review as required by the Supreme Court in *Abbott Laboratories*. Neither section 592(b)(1) nor section 592(i), the two subsections of the Ethics Act limiting judicial review, indicates that Congress meant to preclude all review. Subsection 592(b)(1) is the only explicit limitation in the Ethics Act on judicial review of the Attorney General's decision not to ask for the appointment of independent counsel:

If the Attorney General, upon completion of the preliminary investigation, finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the [special] division of the court . . . and the [special] division of the court shall have no power to appoint a [sic] independent counsel.¹²⁶

Although the Ethics Act is silent on whether any federal court may review the Attorney General's refusal to investigate an alleged violation of the Act, section 592(b)(1) limits only the special division's power to appoint an independent counsel on its own initiative.¹²⁷ Section

reading of these oversight provisions persuades us that Congress intended them to be exclusive. See *Banzhaf*, 737 F.2d at 1168-70.")

125. See *supra* notes 101-07.

126. 28 U.S.C. § 592(b) (1982) (emphasis added). This review should be a simple determination of whether the Attorney General conducted a preliminary investigation. As for the determination of whether the information submitted to the Attorney General met the "specific" and "credible" standard, see *supra* note 87.

127. A loose reading of the statutory framework of the Ethics Act could arguably lead, as it did in *Banzhaf*, to a decision supporting the Attorney General's refusal to request the appointment of independent counsel. Such a loose reading would, however, have no effect on the Attorney General's duty to make a preliminary investigation.

592(b)(1) also shows that Congress intended to limit judicial review only of the Attorney General's decision not to request independent counsel, and not of the Attorney General's decision on whether to conduct a preliminary investigation.¹²⁸

b. The Court's Use of *Block* and *Banzhaf* is Inappropriate

The Ninth Circuit relied on two cases in its discussion of judicial reviewability: *Block v. Community Nutrition Institute*¹²⁹ and *Banzhaf v. Smith*.¹³⁰ The court applied these cases inappropriately. Moreover, neither case readily applies to the situation in *Dellums*.

i. *Block v. Community Nutrition Institute*

The court used *Block* to rebut the APA's presumption of public standing to request review.¹³¹ Quoting *Block*, the court stated that the "general presumption [favoring reviewability] is not controlling where a congressional intent to preclude review at the behest of particular potential litigants is 'fairly discernible' in the statutory scheme as a whole or in the statute's legislative history."¹³² The court then quoted *Block* to make what appears *Dellums*'s decisive argument: " 'In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.' " ¹³³ In applying this language, the court reasons that since Congress vested some oversight in members of the congressional judiciary committees, it impliedly precluded judicial review at the behest of others.¹³⁴

The court's application of the *Block* formula to the Ethics in Government Act is misconceived. *Block* concerned a suit by milk consumers challenging the Secretary of Agriculture's application of the Agricultural Marketing Agreement Act in his formulation of compensatory payment requirements for reconstituted milk.¹³⁵ Not only did the Secretary's decision involve complex pricing and marketing formulas,¹³⁶ but the

128. See *Dellums*, 797 F.2d at 823.

129. 467 U.S. 340 (1984).

130. 737 F.2d 1167 (D.C. Cir. 1984).

131. *Dellums*, 797 F.2d at 822-23.

132. *Id.* at 822 (quoting *Block*, 467 U.S. at 350-51).

133. *Id.* at 822-23.

134. *Dellums*, 797 F.2d at 822-23.

135. 467 U.S. at 341.

136. The syllabus preceding the opinion in *Block* gives a feeling for the complexity of the act being reviewed by the court:

To bring destabilizing competition among dairy farmers under control, the Agricultural Marketing Agreement Act of 1937 (Act) authorizes the Secretary of Agriculture (Secretary) to issue milk market orders setting the minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products. Pursuant to this authority, the Secretary issued market orders under which handlers are required to pay for "reconstituted milk" (milk manufactured by mixing milk powder with water) the minimum price for Class II milk (raw milk used to produce such products

decision was statutorily mandated to be "a cooperative venture among the Secretary, [milk] handlers, and producers."¹³⁷ Although the Act provided for the Secretary, producers, and handlers to participate in hearings and to vote, the Act nowhere provided for participation by consumers in any proceeding.¹³⁸ The Court then added that "[i]n a *complex scheme of this type*"¹³⁹ omitting consumer participation is sufficient reason to believe Congress meant to foreclose consumers from the regulatory process.¹⁴⁰

The Court's general language regarding the provision of a mechanism for particular persons to instigate judicial review¹⁴¹ takes on, in the context of *Block's* regulatory scheme, a very different meaning than in *Dellums*. In *Block*, the court specifically finds that "[a]llowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative scheme."¹⁴² The reason is clear. Regulatory schemes to raise producer prices help producers at the expense of consumers. When two groups have such directly opposed interests, the granting of an important participatory role in the regulatory process to one implies almost by necessity that Congress is favoring the one group over the other.

The Ninth Circuit removes general language from this complex administrative framework and woodenly applies it to a different context. Yet, in the *Dellums* context, Congress is not granting power to one group at the expense of an opposing group. Members of the judiciary committees have the same interest as the public in ensuring that the primary purpose of the Ethics Act is fulfilled, i.e., guaranteeing that individuals engaged in wrongdoing do not receive favored treatment because of their relationship with the Attorney General.¹⁴³ Whereas in *Block* suits by consumers would *frustrate* the administrative scheme, lawsuits like *Dellums* brought by the public facilitate the administrative scheme.

ii. *Banzhaf v. Smith*

The Ninth Circuit evaded the problems inherent in its application of *Block's* general language by refusing to make explicit its analysis of the

as dry milk powder) rather than the higher price covering Class I milk (raw milk processed and bottled for fluid consumption). The orders assume that handlers will use the reconstituted milk to manufacture surplus milk products, but for any portion of reconstituted milk not so used handlers must make a "compensatory payment" equal to the difference between Class I and Class II milk product prices.

Block v. Community Nutrition Institute, 467 U.S. at 340.

137. *Block*, 467 U.S. at 346.

138. *Id.* at 346-47 (citations omitted).

139. *Id.* at 347 (emphasis added).

140. *Id.*

141. "[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be implied [sic] precluded." *Id.* at 349.

142. *Id.* at 348.

143. See *supra* note 79.

statutory scheme. Instead, it merely "concluded,"¹⁴⁴ citing to *Banzhaf*, that the entire statutory scheme manifests an intent to preclude review.¹⁴⁵

This reliance on *Banzhaf* is itself misplaced. *Banzhaf* and *Dellums* are readily distinguishable because they address different stages of the Attorney General's obligations under the Ethics Act. The *Banzhaf* plaintiffs addressed only the second stage of the Ethics Act, which concerns judicial review of the Attorney General's decision whether to ask for appointment of independent counsel. The *Banzhaf* plaintiffs' suit focused on the Attorney General's discretion to decide whether to ask for the appointment of independent counsel. In contrast, the *Dellums* plaintiffs based their claim upon the Act's first stage requirement that the Attorney General conduct a preliminary investigation upon receipt of specific and credible information of criminal activity.

To understand why the distinction between the first and second stage decisions is so important, one must examine how the *Banzhaf* court analyzed the Attorney General's second stage decision not to request appointment of independent counsel. The *Banzhaf* court relied on two main arguments, the first of which is clearly irrelevant to the appointment question, and the second irrelevant to the peculiar posture of the *Dellums* case.

First, the court focused on the unreviewability, by the special division, of the Attorney General's decision not to request appointment of independent counsel. The court found untenable the idea that Congress would have explicitly excluded the special division's power to review, but would instead have intended to permit such review "in any federal District Court."¹⁴⁶

Whatever this argument's merit in the second stage appointment decision, it is clearly irrelevant to the question of judicial review of the preliminary investigation. Congress explicitly gave the Attorney General discretion in his second stage decision to decide one way or the other, *after* his preliminary investigation. In contrast, Congress gave the Attorney General little discretion regarding the preliminary investigation; the Ethics Act states that he "shall" investigate upon the receipt of specific and credible evidence. Not only does this standard of decision offer courts clear guidelines for review, but in *Dellums*, the Attorney General admitted that the standard was met.

Second, the *Banzhaf* court relied on the argument that by permitting judicial review of the Attorney General's decision not to investigate,

144. *Dellums*, 797 F.2d at 823.

145. *Id.* The *Banzhaf* court itself had applied §§ 592(b)(1) and 592(f). The two subsections apply only marginally in *Dellums* because the two situations which they address never arose. They preclude judicial review in some situations occurring after the Attorney General has conducted a preliminary investigation. The Attorney General neither conducted a preliminary investigation nor asked for the appointment of independent counsel.

146. *Banzhaf*, 737 F.2d at 1169.

criminal charges that might prove unfounded would be prematurely aired in the district court.¹⁴⁷ That argument's validity rests on whether parties contest the specific and credible nature of the evidence. In the *Dellums* situation, however, this is an inappropriate policy justification. The question of the sufficiency of the evidence was no longer at issue in *Dellums*; the only question necessitating resolution was the Attorney General's refusal to follow the law.

c. *Nathan v. Smith* Does Not Offer a Sufficient Mode of Analysis

Banzhaf also relied on Judge Bork's summary of the legislative history of the Ethics Act in his concurring opinion in *Nathan v. Smith*.¹⁴⁸ This case, however, also provides weak support. Judge Bork inappropriately concluded that Congress intended to exclude private remedies given that the statute "confer[red] very broad discretion upon the Attorney General."¹⁴⁹ He conflated several elements of legislative history, and inappropriately suggested that the Ethics Act must create a private right of action before a private party may sue under it.

This Note already has critiqued the discretion issue;¹⁵⁰ this Section, therefore, discusses only Bork's legislative history argument. Bork was far too willing to presume specific congressional intent from legislative history that is at best ambiguous. Seven "Special Prosecutor" bills were introduced in the 94th Congress, none of which passed.¹⁵¹ Two of these contained specific private enforcement language.¹⁵² In the succeeding Congress, only two bills were introduced, neither of which happened to include private enforcement language. Because the succeeding Congress enacted a special prosecutor law lacking the private enforcement language, Bork assumed that Congress contemplated including the private enforcement language but chose otherwise. Although Bork thereby implies rhetorically that the sponsors must have had a change of heart, Bork does not mention whether Congress deleted the private enforcement language of the two original bills or whether the two bills reintroduced in the 95th Congress merely happened to be two of the original seven bills always lacking such language.

Moreover, the Supreme Court has not followed Judge Bork's reasoning that a statute must create a private right of action before a private party may sue under it. In *Japan Whaling Association v. American Cetacean Society*,¹⁵³ the Supreme Court observed that "[a] separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of

147. *Banzhaf*, 737 F.2d at 1169-70.

148. 737 F.2d 1069 (D.C. Cir. 1984).

149. *Id.* at 1080 (Bork, J., concurring).

150. See *supra* notes 67-72 and accompanying text.

151. *Nathan*, 737 F.2d at 1080.

152. *Id.*

153. 478 U.S. 221, 231 n.4 (1986) (reviewing a decision by the International Whaling Commission not to impose sanctions against Japan).

such action is available absent some clear and convincing evidence of legislative intention to preclude review."

d. The Subsection 595(e) Oversight Provision As An Exclusive and Adequate Remedy to Safeguard the Ethics Act

As already noted, the Ninth Circuit relied on the Judiciary Committee oversight provision in section 595(e) of the Ethics Act to deny plaintiffs standing.¹⁵⁴ The Ninth Circuit reasoned that because section 595(e) explicitly provided for Congressional action to compel an investigation, the section impliedly precluded public enforcement of the Act:

Central to our analysis is the Ethics Act's provision for oversight of the Attorney General's compliance with the Ethics Act by members of the congressional judiciary committees, not the public. *See*, 28 U.S.C. § 595. Our reading of these oversight provisions persuades us that Congress intended them to be exclusive. *See Banzhaf II*, 737 F.2d at 1168-70.¹⁵⁵

However, the requisite majority of Democratic members of the Judiciary Committee had requested in writing that the Attorney General apply for the appointment of an independent counsel."¹⁵⁶ The Attorney General nevertheless failed to conduct a preliminary investigation.¹⁵⁷ The Ninth Circuit relegated to a footnote Congress's ineffective invocation of the oversight provision, remarking only that "[t]he committee members are not parties to this suit," and noting Congress's failure to enforce it successfully.¹⁵⁸

The Ninth Circuit's reading of the Ethics Act leaves only one route for judicial enforcement; the required members of the Judiciary Committee must first request in a letter that the Attorney General apply for appointment of counsel. If the Attorney General refuses the request, the members of the Judiciary Committee who sent the letter may then sue the Attorney General.¹⁵⁹

The Court erred in interpreting the oversight provision to be the "exclusive" remedy.¹⁶⁰ As discussed earlier, the court, in its interpretation of the statutory framework of the Ethics Act, relied largely on a

154. *Dellums*, 797 F.2d 817, 823 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167, 1169 (D.C. Cir. 1984).

155. *Dellums*, 797 F.2d at 823.

156. The letter stated the Reagan Administration policy toward Nicaragua "appeared to violate" the Neutrality Act and "strike[s] at the heart of the Congressional power to declare war." *N.Y. Times*, April 13, 1984, at A3, col. 3. Thirteen of the twenty Democratic members of the House Judiciary Committee signed the letter, which House Speaker Thomas P. O'Neill also supported. *Id.*

157. *Dellums*, 797 F.2d 817.

158. *Id.* at 822 n.3.

159. *See Note, The Ethics in Government Act of 1978: Problems With the Attorney General's Discretion and Proposals for Reform*, 1985 DUKE L.J. 497, 513-15 (suggests giving Congress the power to seek writs of mandamus to compel compliance by the Attorney General).

160. Although the D.C. Circuit relied on the existence of the oversight provision, the court never explicitly referred to the provision as the "exclusive" remedy, as the *Dellums* Court did. *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984).

faulty application of *Block v. Community Nutrition Institute's* general language, which the court inappropriately applied to the Ethics Act's very different statutory framework. The fact that Congress had already invoked the oversight provision unsuccessfully before the Ninth Circuit decided *Dellums*¹⁶¹ further demonstrates the weakness of the court's statutory interpretation. The provision's ineffectiveness gave the Court ample reason to hold that the oversight provision was not an exclusive remedy.¹⁶² It is unlikely that, in a statute designed to compel Attorney General investigation in specific cases, Congress affirmatively would have desired to restrict standing to members of the judiciary committees if that route would prove ineffective.

2. *The APA Section 701(a)(2) Exception: Committed to Agency Discretion*

In accordance with the Supreme Court's decision in *Overton Park*, section 701(a)(2) does not upset the presumption of reviewability unless there is no law to apply. The Ethics Act is not one of those "rare instances" in which a statute is written so broadly that there is no law to apply. Section 592(a) of the Act clearly provides that the Attorney General must conduct a preliminary investigation upon receipt of specific and credible evidence of executive wrongdoing.

The presumption of unreviewability articulated in *Heckler v. Chaney* for cases of nonenforcement is not applicable to *Dellums*. *Heckler* does not preclude private citizens from seeking judicial review under the Ethics Act for two reasons. First, the presumption of unreviewability does not apply because the Ethics Act contains "guidelines for the agency to follow in exercising its enforcement powers."¹⁶³ Sections 592(b) and (c) supply the necessary guidelines for the Attorney General and the courts to follow. Second, Justice Brennan's concurrence points out the limited scope of the *Heckler* decision. After listing several situations where a nonenforcement decision would be reviewable, Brennan suggests that "[i]t is possible to imagine other nonenforcement decisions made for entirely illegitimate reasons, for example, nonenforcement in return for a bribe, judicial review of which would not be foreclosed by the nonreviewability presumption."¹⁶⁴ The Attorney General's decision

161. *Dellums v. Smith*, 797 F.2d 817, 822 (9th Cir. 1986). Congress could have responded to the failure of the oversight provision by amending the Ethics Act to provide a more effective enforcement mechanism. Some recommendations for amending the Ethics Act have included (1) expressly providing a private right of action to compel a preliminary investigation; and (2) allowing Congresspersons, through the congressional oversight provision, to compel immediate action from the Attorney General. Note, *supra* note 159, at 511-15.

The Ninth Circuit might have precluded the necessity of amendments providing more effective oversight mechanisms by interpreting the Ethics Act according to Congress's apparent intent. The court could have effected this result by affirming the District Court's decision ordering the Attorney General to conduct a preliminary investigation.

162. See Note, *supra* note 159, at 508.

163. 470 U.S. at 833.

164. *Id.* at 839.

not to investigate in *Dellums* should also be exempt from *Heckler*.

B. Overcoming the Potential Political Question Problem

The Ninth Circuit never reached the political question doctrine in *Dellums*. Because the claimants in *Sanchez-Espinoza* faced political question doctrine problems, the question arises whether the *Dellums* plaintiffs, if they were successful in showing standing and reviewability, would then have been frustrated by the court's invocation of the political question doctrine. This Note contends that the political question doctrine would have been inapplicable to the *Dellums* situation.

The district court dismissed the claims in *Sanchez-Espinoza* by invoking the political question doctrine.¹⁶⁵ The D.C. Circuit chose to decide most of the issues on other grounds,¹⁶⁶ including its resolution of the asserted Neutrality Act violations. The court reasoned that allowing private parties to push for enforcement of a criminal law would interfere with prosecutorial discretion.¹⁶⁷

The district court in *Dellums* had addressed the political question issue and found no bar to the plaintiffs' remedy.¹⁶⁸ The district court correctly determined that *Dellums* raised no political question problem. The court reasoned that "[u]nlike the complaints in *Crockett v. Reagan*¹⁶⁹ and *Sanchez-Espinoza*, the complaint in the case at bar does not directly challenge the legality of any action taken by the President. Plaintiffs seek only to compel good faith performance [by the Attorney General] of a statutory duty."¹⁷⁰ In particular, the *Dellums* situation avoids the "danger of embarrassment from multifarious pronouncements by various departments"¹⁷¹ at issue in *Sanchez-Espinoza* because the *Dellums* plaintiffs sued only to compel investigation and not for injunctive or monetary relief on the merits.¹⁷²

165. 770 F.2d at 206.

166. *Id.* at 207-11.

167. *Id.* at 210.

168. *Dellums*, 573 F. Supp. 1489, 1502 (N.D. Cal. 1983). The Attorney General had argued that the case's focus on the President's foreign policy made it non-justiciable under the political question doctrine. The District Court responded:

But not every case involving foreign relations lies beyond judicial cognizance. *Baker v. Carr*, 369 U.S. at 211. . . . The issue of justiciability must in such cases be resolved by "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12. . . .

Id.

169. 720 F.2d 1355 (D.C. Cir. 1983). See note 3.

170. 573 F. Supp. at 1493.

171. See *supra* note 33.

172. The *Sanchez-Espinoza* plaintiffs had sought "compensatory and punitive damages, declaratory relief, mandamus injunction, attorneys' fees, and any other just and proper relief." *Sanchez-Espinoza*, 770 F.2d at 206.

III. *Dellums* and the World Court

The actions of the International Court of Justice ("I.C.J.") offer a pointed contrast to those of the Ninth Circuit and American courts in general. Although United States domestic law cannot and should not incorporate all aspects of international law, United States courts should try to harmonize the two bodies of law when practicable. Stepping back from the technicalities of the Ethics Act's and the APA's application to *Dellums*, one sees how the Ninth Circuit missed an opportunity to bring domestic and international law closer together.

Although outlining the complex relationship of international law to domestic law falls outside the scope of this Note, a beginning presumption is that international law is incorporated into domestic law. The Restatement (Revised) of Foreign Relations Law provides that "[i]nternational law . . . [is] law of the United States and supreme over the law of the several States of the United States."¹⁷³

Because international law is part of domestic law, the President must see that it is faithfully executed.¹⁷⁴ The President's general duty to uphold international law does not mean, however, that he can never violate such law. When acting within his constitutional authority, the President has the power to disregard international law.¹⁷⁵ Courts faced with a conflict between international law and an executive act can properly deny effect to the international law.¹⁷⁶ This assumes, however, that the executive is acting under the power of the Constitution and is not violating any domestic laws. This Note proposes that when an executive act clearly violates both domestic and international law, courts should take a hard look at the executive act, and, if necessary, enforce the law.

173. RESTATEMENT (REVISED) ON FOREIGN RELATIONS LAW, § 131(1) (1965). "Courts in the United States are bound to give effect to international law. . . ." *Id.* at § 131(3). "[F]rom our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction." Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984). "International law in the United States has come to be regarded as a kind of federal law, and accordingly no less than treaties and other international agreements, it is accorded supremacy over State law by Article VI of the Constitution." RESTATEMENT (REVISED) ON FOREIGN RELATIONS LAW, Part I, Chapter 2, Introductory Note (1965).

174. "That international law and agreements of the United States are law of the United States means also that the President has the obligation and the necessary authority to take care that they are faithfully executed." RESTATEMENT (REVISED) ON FOREIGN RELATIONS LAW, § 131, comment c (1963).

175. "But the President, acting within his constitutional authority, may have the power under the Constitution to act in ways that constitute violations of international law by the United States." RESTATEMENT (REVISED) ON FOREIGN RELATIONS LAW, § 131, comment c (1965). "There is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States, notwithstanding that international law and agreements are law of the United States and that it is the President's duty under the Constitution to 'take care that the Laws be faithfully executed.'" *Id.* at § 135, reporters' Note 3. See *The Paquete Habana*, 175 U.S. 677, 700, 798 (1900) (Establishing that international law is part of U.S. domestic law).

176. *The Paquete Habana*, 175 U.S. at 700, 798.

In *Nicaragua v. U.S.*, decided only two months before *Dellums*, the International Court of Justice formally condemned American encouragement of the *contras*' effort to overthrow the Nicaraguan government.¹⁷⁷ A nearly unanimous panel of the I.C.J. concluded that the United States had clearly breached international law by "training, arming, equipping, financing, and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua."¹⁷⁸ Given that the I.C.J. had condemned the actions of the Reagan Administration, the Ninth Circuit should have taken the Neutrality Act violation more seriously, not dismissed the case on questionable reviewability grounds, and compelled a preliminary investigation into the situation in Nicaragua.

Conclusion

No court with power to enforce its judgments has examined the merits of cases challenging aspects of U.S. activities in Nicaragua. *Dellums v. Smith* was the most recent opportunity for American courts to review the legality of aspects of Executive Branch support for the *contras*. Because the *Dellums* plaintiffs presented the Attorney General with specific and credible evidence of possible executive violations of the Neutrality Act, the district court found the plaintiffs had standing to sue under the APA, and that the Ethics Act required the Attorney General to undertake a preliminary investigation. The Ninth Circuit used weak arguments regarding standing and reviewability to dismiss the suit.

Dellums v. Smith presents a clear case for allowing judicial review of United States policy towards Nicaragua. The Reagan Administration's plan of November 1981 called for a military expedition to overthrow the government of a country with which the United States is at peace. In so doing, Administration officials violated the Neutrality Act, a criminal law that has traditionally applied to the President as well as to other persons. The Ethics Act restricts the Attorney General's discretion not to investigate alleged violations of the criminal law by certain officers of the Executive Branch. The APA in turn provides members of the public a presumptive right to sue to compel Attorney General compliance. No persuasive analysis of statutory intent or legislative history existed to overcome this presumption. The Ninth Circuit therefore should have upheld the district court's opinion.

Stephen Bain

177. *Nicar. v. U.S.*, 1986 I.C.J. 14.

178. *Id.* at 146.